

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

AUSTIN H.

Claimant,

vs.

REDWOOD COAST REGIONAL
CENTER,

Service Agency.

OAH No. N 2006100002

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in Eureka, California, on December 12, 2006.

Patrick Okey, Director of Clinical Services for Redwood Coast Regional Center, represented the service agency, Redwood Coast Regional Center.

Donna H., claimant's mother, represented the claimant, Austin H.

ISSUE

Is claimant entitled to an additional 20 hours a week of respite care?

FACTUAL FINDINGS

BACKGROUND

1. Claimant, Austin H., was born in 1980. He is 26 years old. He is diagnosed as autistic with obsessive compulsive disorder. Within the terms of the Lanterman Act,¹ claimant is a person with a developmental disability. He has been a regional center

¹ The Lanterman Developmental Disabilities Services Act begins at Welfare and Institutions Code section 4400.

consumer since he was three years old. He needs assistance with hygiene, dressing, toileting, bathing, housekeeping, and meal preparation. Claimant's mother, Donna H., testified that claimant is not able to do anything independently. Claimant is a big man. He often is loud and intimidating. He pushes people. He runs away if he is left unattended.

2. Claimant is not conserved.

3. Claimant lives in a mother-in-law unit next to his mother's home. Donna H. has two other sons, one of whom lives with her. Also, she has adopted her grandson, Seth, and he also lives with her. Seth, like claimant, is autistic.

4. Claimant must have a caretaker with him twenty-four hours a day. Indeed, because of his behaviors and intimidating character, he must have two caretakers when he goes out into the community. Donna H. stays with him at night. She and other caretakers stay with him during the day.

5. Claimant receives social security income, and his mother uses that to pay his living expenses, including the cost of his housing

SERVICES CLAIMANT RECEIVES

6. A June 5, 2003, individual program plan (IPP) provides that regional center will pay for 400 hours a month of behavioral respite for claimant. The respite providers work through the Humboldt Child Care Counsel (HCCC). HCCC provides five hours a month of training for the respite workers. A behaviorist does the training.

7. In August of 2006, after claimant was expelled from his day program, regional center agreed to increase the respite to 450 hours a month. Additional hours were needed because, in the day program claimant had a one-on-one aid, but on outings into the community in a less structured setting, he requires two caretakers. Thus, when the day program no longer was available to him, he needed additional caretaker hours in order to be able to go out into the community.

8. The June 5, 2003, IPP is claimant's most recent IPP. It is outdated and should be revised.

9. In Home Support Services pays Donna H. to provide 283 hours of care a month.

10. If one adds the 450 hours of respite that regional center provides and the 283 hours for which In Home Support Services pays, the total is 733. As an average, there are 30½ days in a month. At 24 hours a day, that is 732 hours in month. Thus, claimant is receiving more than full time care. But because claimant cannot go out into the community without two caretakers, he needs more than just full time care by one person.

11. Seth also requires a great deal of Donna H's attention. Seth attends special education classes five days a week. He leaves home at 7:30 a.m. and returns at 4:00 p.m.

Regional center provides respite care for Seth. It is not clear, however, how many hours of respite care he receives. At the hearing in this matter, Patrick Okey, Director of Clinical Services for the regional center, testified that the records he reviewed seemed to be in conflict and that he could not determine how many hours of respite services the regional center was providing for Seth. Donna H. testified that, in an August 11, 2006, meeting the regional center agreed to increase the hours for Seth by 100 hours a month, but Mr. Okey testified that he believed the increase was to be only 100 hours a quarter. A December 7, 2006, letter indicates that the regional center provides 145 hours a quarter of respite care for Seth.

DONNA H'S SCHEDULE

12. Donna H. testified that her schedule is as follows:
13. From 6:00 a.m. to 7:30 a.m. she is in her house helping the children get ready for school.
14. From 7:30 a.m. to noon, she is with claimant.
15. From noon to 4:00 p.m. she does housework and runs errands.
16. From 4:00 p.m. to 8:30 p.m., she cares for Seth.
17. From 8:30 p.m. to 10:00 p.m., she has time for herself.
18. From 10:00 p.m. to 6:00 a.m., she is with claimant.
19. On weekends, when Seth is not in school, a respite worker must be with him. If he is left alone, he runs away. As noted above, it is not clear how many hours of respite care Seth receives. If he receives 145 hours a quarter, as the December 7, 2006, letter indicates, Donna H. would have to spend an additional two and one-half hours with him on Saturdays and on Sundays.
20. This schedule permits claimant to go out into the community approximately four hours a day. That is, this schedule allows for claimant to have two respite workers at a time for approximately four hours a day.

A HISTORY OF CLAIMANT'S PROGRAMS

21. Kim Nash was claimant's regional center service coordinator from 2001 through 2004. Ms. Nash testified regarding the services the regional center has provided for claimant.
22. For several years, Bungalow Supported Living Services provided services for claimant. The Bungalow staff wanted to use a picture exchange program to encourage claimant to learn to communicate. Claimant did not like the picture exchange program, and

Donna H. refused to permit its use. In the fall of 2002, Bungalow refused to continue to provide services for claimant.

23. HCCC provides a behaviorist to train claimant's respite workers so that they will be better equipped to take him out into the community. For some time, Carry Moses Roth was the behaviorist. Ms. Roth, as had the Bungalow staff, wanted to use a picture exchange program to encourage claimant to learn to communicate. Again, Donna H. refused to permit its use. Also, Donna H. would not permit the respite workers to follow certain programs Ms. Roth designed for claimant. Ms. Roth refused to continue. HCCC retained another behaviorist.

24. HCCC was supposed to recruit and select claimant's respite workers. But it became so difficult to find respite workers for claimant, that HCCC began allowing Donna H. to recruit and select them.

25. For seven years, regional center funded a day program for claimant at Carol Sund Center. Claimant was hurting other consumers and, in August of 2006, Carol Sund refused to allow him to stay in the program.

26. In the day program, claimant had a one-on-one aid. That allowed him to get out in the community to some extent without using double respite hours. That is, it allowed him to get out of the house without having to have two caretakers with him.

27. Ms. Nash testified that meetings of claimant's IPP team were chaotic. She testified that Donna H. occasionally failed to tell claimant's respite workers about changes in claimant's medications and tended to undermine the workers' attempts to implement the programs that Ms. Roth designed. She said that chaos at team meetings, Donna H's failure to advise workers of medication changes, Donna H's refusal to permit the use of a picture exchange program, and claimant's intimidating behaviors cause it to be extremely difficult to hire competent respite workers, find a day program for claimant, or find a supported living provider for him.

28. Ms. Nash testified that, because she was unable to find a supported living provider for claimant, regional center decided to use respite for a purpose for which it is not intended – to facilitate claimant's being able to live in his own apartment.

29. In July of 2005, Angie Davis became claimant's regional center service coordinator. Ms. Davis, as did Ms. Nash, testified that Donna H. places conditions on service providers that make it virtually impossible to find a supported living provider for claimant. Ms. Davis testified that she has tried to find a day program that will accept claimant and that she has tried to find a supported living provider for him but has been unsuccessful.

30. Donna H. doubts that Ms. Davis has made a real effort to find services for claimant and has asked regional center to assign someone other than Ms. Davis as claimant's service coordinator.

ADDITIONAL SERVICES CLAIMANT IS REQUESTING

31. Donna H. is requesting an additional 20 hours a week of behavioral respite for claimant. She testified that she is faced with a crisis because she cannot continue to care for claimant if she has virtually no free time for herself. She currently has only 8:30 p.m. to 10:00 p.m. each evening and never has a day off.

32. Donna H. professes that she wants supported living services for claimant. She claims that a representative of the regional center told her that any agency that might be willing to provide supported living services for claimant would insist that she have no say in claimant's care at all. She insists that she must be involved in day to day decisions regarding claimant's care.

33. Regional center points to the fact that it is already providing more respite hours than claimant's IPP specifies. Respite is not intended to take the place of a supported living program. Respite is temporary care and supervision to relieve family members from the demanding responsibility of caretaking. It is intended to assist family members in maintaining a consumer at home.

LEGAL CONCLUSIONS

AN OVERVIEW OF THE LAW REGARDING THE SERVICES TO WHICH CLAIMANT IS ENTITLED

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act),² is an entitlement act. People who are eligible under it are entitled to services and supports.³

The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (citations) and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (citations).⁴

2. Persons with developmental disabilities have "a right to dignity, privacy, and humane care," and services and supports, when possible, should be provided in natural community settings.⁵ Persons with developmental disabilities have "a right to make choices

² Welf. & Inst. Code, § 4500, et seq.

³ *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.

⁴ *Id.* at p. 388.

⁵ Welf. & Inst. Code, § 4502, subd. (b).

in their own lives” concerning “where and with whom they live.”⁶ Regional centers should assist “persons with developmental disabilities and their families in securing those services and supports . . . [that] maximize opportunities and choices for living, working, learning, and recreating in the community.”⁷ Regional centers should assist “individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices.”⁸

3. In *Williams v. Macomber*,⁹ the court of appeal addressed the Lanterman Act and said:

“In order for the state to carry out many of its responsibilities as established in this division,” the Act directs the State Department of Developmental Services to contract with “appropriate private nonprofit corporations for the establishment of” a “network of regional centers.” (§§ 4620, 4621.) Regional centers are authorized to “[p]urchase . . . needed services . . . which regional center determines will best” satisfy the client’s needs. (§ 4648.) The Act declares: “It is the intent of the Legislature to encourage regional centers to find innovative and economical methods” of serving their clients. (§ 4651.) The Act directs that: “A regional center shall investigate every appropriate and economically feasible alternative for care of a developmentally disabled person available within the region.” (§ 4652.)

. . .

[T]he Regional Center’s reliance on a fixed policy is inconsistent with the Act’s stated purpose of providing services “sufficiently complete to meet the needs of each person with developmental disabilities.” (§ 4501.) The Act clearly contemplates that the services to be provided each client will be selected “on an individual basis.” (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d 384, 388.)

A primary purpose of the Act is “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family.” (*Association for Retarded Citizens v.*

⁶ *Id.* at § 4502, subd. (j).

⁷ *Id.* at § 4640.7, subd. (a).

⁸ *Id.* at § 4648, subd. (a)(1).

⁹ (1990) 226 Cal.App.3d 225.

Department of Developmental Services, supra, 38 Cal.3d 384, 388.) In strong terms, the Act declares: “The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families” requiring the state to “give a very high priority to the development and expansion of programs designed to assist families in caring for their children at home.” (§ 4685, subd. (a).) In language directly applicable to the present case, section 4685, subdivision (b), states that “regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child . . .” (§ 4685, subd. (b).)

The Lanterman Act “grants the developmentally disabled person the right to be provided at state expense with only such services as are consistent with its purpose.” (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d 384, 393.) As noted previously, a primary purpose of the Act is to “minimize the institutionalization of developmentally disabled persons and their dislocation from family.”¹⁰

4. Two of the provisions the court quotes from the Lanterman Act bear repeating. They emphasize the importance of providing services and supports that make it possible for families to withstand the trials associated with keeping a disabled person at home.

[R]egional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home¹¹

Regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child, before considering out-of-home placement alternatives.¹²

5. In giving examples of services and supports that should be considered, the act specifically mentions personal care, domiciliary care, special living arrangements, recreation, community integration services, homemaker services, paid roommates, paid neighbors, and respite.

“Services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the

¹⁰ *Id.* at pp. 232-233.

¹¹ Welf. & Inst. Code, § 4685, subd. (b)(1).

¹² *Id.* at § 4685, subd. (c)(2).

alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . personal care, day care, domiciliary care, special living arrangements . . . recreation . . . community integration services . . . homemaker services, paid roommates, paid neighbors, respite . . . [and] supported living arrangements¹³

REQUIREMENT THAT REGIONAL CENTERS BE COST CONSCIOUS

6. While the Lanterman Act emphasizes the services and supports to which consumers are entitled, the act also requires regional centers to be cost conscious.

[I]t is the . . . intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources. (Emphasis added.)¹⁴

7. When selecting a provider of consumer services and supports, the regional center, the consumer, or where appropriate, his or her parents, legal guardian, conservator, or authorized representative shall consider, "the cost of providing services or supports of comparable quality by different providers, if available."¹⁵

¹³ *Id.* at § 4512, subd. (b).

¹⁴ *Id.* at § 4646(a).

¹⁵ *Id.* at § 4648(a)(6)(C).

8. The Lanterman Act requires regional centers to do a number of things to conserve state resources. For example, it requires regional centers to “recognize and build on . . . existing community resources.”¹⁶

9. None of these provisions concerning cost-effectiveness detracts from the fact that eligible consumers are entitled to the services and supports provided for in the Lanterman Act. These provisions concerning cost-effectiveness do teach us, however, that cost-effectiveness is an appropriate concern in choosing how services and supports will be provided. Nevertheless, there is a tension between the requirement that services and supports be cost-effective and the proposition that entitlement is determined by what is needed to implement a consumer’s individual program plan. If it were not for the requirement that services and supports be cost-effective, a consumer would be entitled to anything that had any tendency at all to promote the implementation of his or her individual program plan. But the entitlement provisions must be read in conjunction with the cost-effectiveness requirement. Also, one must consider the entire array of services and supports that are in place in judging whether a consumer needs and is entitled to an additional service or support. Again, the cost-effectiveness of a particular service or support must be measured against the extent to which it will advance the goal specified in the IPP, and consideration must be given to alternative means of advancing the goal.

DETERMINATION REGARDING CLAIMANT’S ENTITLEMENT TO AN ADDITIONAL 20 HOURS A WEEK OF SERVICES

10. It is determined that, so long as claimant’s living arrangement continues as it is and so long as he has no day program, he is entitled to an additional 20 hours a week of respite care.

11. Donna H. testified that she is faced with a crisis because she cannot continue to care for claimant if she has virtually no free time for herself. Her testimony on this point was very believable. She currently has only 8:30 p.m. to 10:00 p.m. each evening for herself and never has a day off.

12. Claimant proved that Donna H. has virtually no time off, that she feels she is in a crisis, and that this situation places claimant at risk. He is entitled to services to minimize the risk that he will not have an appropriate place to live. It may be that the current arrangement is not the best one for claimant. And it may be that it is Donna H’s fault that no supported living provider can be found for claimant. But regional center chose to use respite care as a means of allowing claimant to stay in his own apartment. Also, regional center has permitted claimant’s IPP to become outdated and probably no longer appropriate for his needs. Regional center did not propose an alternate living arrangement or suggest that the current arrangement is substantially more expensive than some other viable arrangement.

13. If regional center finds a day program or supported living provider for claimant or if his living arrangement changes, his need for respite care should be reevaluated.

¹⁶ *Id.* at § 4685(b).

ORDER

Claimant's appeal from the regional center's denial of his application for an additional 20 hours a week of respite care is granted.

DATED: December 28, 2006

A handwritten signature in black ink that reads "Robert Walker". The signature is fluid and cursive, with a long horizontal stroke at the end.

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.